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No. 420

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BANCO DO BRASIL, S. A., *Petitioner,*

v.

A. C. ISRAEL COMMODITY CO., INC., *Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES

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The Court, on November 18, 1963, invited the Solicitor General to file "a brief expressing the views of the United States." Thereafter, and some six weeks later on January 2, 1964, the Solicitor General filed a four and one-half page "Memorandum for the United States." Apart from an argument addressed to an irrelevant point concerning Article VIII, Section 2(b) of the Fund Agreement and an abortive attempt to distinguish *Kolovrat* v. *Oregon*, 366 U.S. 187, the Memorandum for the United States expresses the belief of the Departments of State and Treasury that "in their view . . . the bare acceptance of the Bretton Woods Agreement (sic) did not establish a national policy requiring the Courts of the State of New York to enter-

tain this suit" (Memorandum, p. 4).[1] The Solicitor General also states that he concurs in the opinion expressed by the Departments of State and Treasury, and so suggests that "from the standpoint of the United States, there is no impelling need for review by this Court" (Memorandum, p. 5). But the Solicitor General, although the Court imposed no time limitation upon him, does not favor the Court and Petitioner with any reason for the stated belief of the Departments of State and Treasury and his concurrence. Indeed, it is not clear whether this expression of departmental opinion is based upon reasons of policy, expediency or law or a combination thereof. Neither does he respond in any way to the many reasons we have advanced for our contrary view. See the whole of Points 2 and 3 of our Petition. In short, since we do not question that someone in the Departments of State and Treasury has expressed the unexplained belief which the Solicitor General has transmitted to the Court together with his unexplained concurrence, our Reply must be largely confined to apposite comments on the details of an action of the Solicitor General which could have no pertinent precedent later than the period of struggle between the common-law courts and the fiat of the Stuart kings.

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[1] It is to be noted for purposes of clarity that the references in the Solicitor's Memorandum to the "Bretton Woods Agreement" technically are references to the Articles of Agreement of the International Monetary Fund (or Fund Agreement). The "Bretton Woods Agreements" is a term employed with respect to the two international agreements negotiated at the Bretton Woods Conference in July, 1944, i.e., the Articles of Agreement of the International Monetary Fund and the Articles of Agreement of the International Bank for Reconstruction and Development (World Bank).

(1) So far as the Solicitor General argues anything, he devotes himself largely to an argument (Memorandum, pp. 3-4) that Article VIII, Section 2(b) of the Fund Agreement does not impose an obligation on our courts to entertain suits like this one. Since our Petition makes no contention that Article VIII, Section 2(b) does impose such an obligation, there is no point to the Solicitor General's argument.[2] Our reliance (Petition, Points 2 and 3) is on a national foreign policy evidenced by United States adherence to the *whole* of the Fund Agreement considered in the light of the history of its development by the Executive Branch of our Government, the legislative history of its acceptance and implementation by the Congress, and its place in the context of American foreign policy. Except for the profession of beliefs without supporting argument, the Solicitor General has offered nothing to show our reliance on the whole of the Agreement to be wrong.

(2) The Solicitor General's attempted distinction of *Kolovrat* v. *Oregon*, 366 U.S. 187, is made in four Delphian sentences (Memorandum, p. 4). First the Solicitor General says that what "was held in *Kolo-*

[2] Actually the discussion by the Solicitor General of both Article VIII, Section 2(b) of the Fund Agreement, and of the Fund Agreement generally, suggests that he has misconceived the whole theory of Petitioner's case. Petitioner is not contending that its cause of action arises by virtue of either Article VIII, Section 2(b) or the Fund Agreement generally. Petitioner's cause of action is in tort for damages resulting from the alleged conspiracy of Respondent and others to defraud Petitioner. The Fund Agreement in this context is not the source of Petitioner's right. Rather it is Petitioner's position that by virtue of United States adherence to the Fund Agreement, the State of New York cannot, for reasons of local policy, refuse to entertain Petitioner's claim because the fraud alleged involved Brazil's exchange regulations.

vrat was that the Bretton Woods Agreement constituted an expression of national policy on the subject of foreign exchange, which the State of Oregon was not at liberty to disregard." We agree with that statement if we understand it correctly. We add, however, that the national policy evidenced by adherence to that Agreement which barred the State of Oregon from cutting off the rights of private litigants, as a matter of state policy, is the same national policy in the field of foreign exchange, evidenced by adherence to the same Agreement, which bars New York, in the exercise of state policy, from cutting off rights which the Petitioner otherwise would have as a litigant. Second, the Solicitor General says: "The claim rejected in *Kolovrat* as inconsistent with this established national policy was based on the assumption that a Bretton Woods member might fail to meet obligations which were *expressly* set out in the Agreement". (Underscoring is in original.) We are not sure what that statement means. If the Solicitor General means that *Kolovrat* found an obligation imposed on Yugoslavia by the Agreement not to forbid the export of inherited capital, we answer that the Court found no such obligation imposed by the Agreement, expressly or otherwise, and that no such obligation, in fact, exists. And neither does the Agreement impose any obligation on Brazil to permit coffee exports which do not comply with her exchange regulations. Third, the Solicitor General says: "No question as to the scope of an obligation imposed by the Agreement was involved." Passing over the apparent inconsistency between that statement and the Solicitor General's second sentence, we comment that this case, like *Kolovrat*, does not turn on the scope of Article VIII, Section 2(b), or, as the Solicitor General asserts in his fourth sentence, upon

"the meaning to be given to" that provision "in light of the United States' adherence to the agreement." The obligation imposed by the Agreement upon Yugoslavia and Brazil alike is that foreign exchange controls and restrictions be maintained consistently with the Agreement. In *Kolovrat,* this Court found that "Our National Government's assent to these international agreements [i.e., Fund Agreement and 1948 Agreement between United States and Yugoslavia], coupled with its continuing adherence to the 1881 Treaty, precludes any State from deciding that Yugoslavian laws meeting the standards of those agreements can be the basis for defeating rights conferred by the 1881 Treaty." Similarly, here, our Government's assent to the Fund Agreement precludes New York from deciding that Brazilian exchange laws meeting the standards of the Fund Agreement can be the basis for defeating Petitioner's right to recover in tort for fraud involving such exchange laws. *Kolovrat* and this case are not distinguishable in reason or in fact. Indeed, the significant differences between this case and *Kolovrat* re-inforce the application of *Kolovrat* to this case. See, Petition at p. 15. Finally, in this connection, we quote the conclusion reached by Mr. Joseph Gold, General Counsel of the International Monetary Fund, in his personal analysis of *Kolovrat* in *The Fund Agreement in the Courts* (p. 134)[3]:

> "That is to say, federal policy, as evidenced by the acceptance of the Fund Agreement by the United States, made it necessary for the individual states to give due effect to the circumstance that the Yugoslav exchange control regulations were

[3] Published by the International Monetary Fund, Washington, D. C. 1962. See pp. 128 et seq.

consistent with the Fund Agreement. This shows that the principle that the foreign exchange controls of a member which are consistent with the Fund Agreement cannot be deemed offensive to the public policy of another member is a principle that can go far beyond the recognition of exchange controls which is prescribed by Article VIII, Section 2(b)."

(3) Since *Kolovrat* is not distinguishable, the position of the United States as stated in its Memorandum cannot be squared with the position of the United States as noted by the Court in *Kolovrat* (366 U.S. at pp. 196-197).

Neither can the action of the Solicitor General in this case be squared with his recent action in *Banco Nacional de Cuba* v. *Sabbatino*, now pending in this Court (No. 16, October Term, 1963). Stripped of nonessentials, the two cases are basically the same on their facts. In both cases a central bank, as agent of a foreign government (Cuba there, and Brazil here), sued American defendants resident in New York, in the Southern District of New York (*Cuba*) and the New York Supreme Court (*Brazil*) in actions in tort-conversion (*Cuba*) and fraud (*Brazil*). In both cases the cause of action involved a foreign law—a nationalization decree held by the lower courts to violate international law (*Cuba*); and a foreign exchange law which in effect requisitions the proceeds of coffee exports with no suggestion by anyone of a violation of international law (*Brazil*). In both cases, the lower courts *for reasons of local policy* found for the New York residents—the alleged converter (*Cuba*), and, at this stage of the record, the admitted fraudulent conspirators (*Brazil*). Despite these apparently obvious similarities, the action of the Solicitor General in *Cuba* contrasts sharply with his action here. In the

case of *Cuba* he filed a well-reasoned ten page memorandum urging the granting of *certiorari*, and expressed his willingness "to present a full statement of the position of the Executive Branch and supporting argument upon the merits." But in this case of *Brazil* he has, in effect, declined the Court's express invitation to file "a brief," although he suggests that *certiorari* be denied.

Surely, the Solicitor General does not believe that the questions to be determined in this judicial proceeding are settled by his mere announcement of the position of the United States. So it would appear that his Memorandum here amounts to an indirect statement of the following: "Since we (State, Treasury, and Justice) are not yet prepared to state a reasoned position or policy on the problems of this case, we would like a denial of review." But Brazil is entitled to justice in this case; and, since the United States continues to adhere to the Fund Agreement, the continuity and consistency of the Court's decisions on the paramount policies and obligations that arise from that adherence should not be prejudiced by the statement of conclusions which precede reasons. Here, the merits of the controversy and the reasons for granting *certiorari* are closely related, if not identical. Hence, we suggest the particular appropriateness of granting *certiorari* and again inviting the Solicitor General to file "a brief" on the merits.[4] *Cf.* the order of this

[4] Petitioner recognizes that where the views of the United States are sought by the Court there is a distinction to be drawn between a brief statement by the Solicitor urging the granting of the Petition, in which case the full basis for the position of the United States will be briefed if *certiorari* is granted (e.g., *Sabbatino*). But where, as here, the Solicitor opposes the granting of *certiorari* and fails at such time to brief the reasons therefor, neither the Court nor the parties are really in a position to evaluate the validity of the position taken unless it is deemed to be *ex cathedra*.

Court with respect to the Solicitor General in *Robinson* v. *Florida*, 32 L.W. 3187.

Respectfully submitted,

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